Supreme Court, U.S.
FILED
APR 17 1996
CLERK

(1)

95-1684

No. _____

In The

Supreme Court of the United States

October Term, 1995

James HANKINS, SR., Marian HANKINS, and JIM HANKINS AIR SERVICE, INC.,

Petitioners,

vs.

Frank E. MELTON,

Respondent.

On Petition For Writ Of Certiorari To The Court Of Appeals Of Mississippi

PETITION FOR WRIT OF CERTIORARI

T. JACKSON LYONS
Standard Life Building
206 West Pearl Street
Jackson, Mississippi 39201
Tel. 601/352-0330
Fax 601/969-1402
E-mail legalres@teclink.net
Mississippi Bar #8988
Counsel of Record for Petitioners

THOMAS J. LOWE, JR.
P.O. Box 2050
Jackson, Mississippi 39225
601/354-1027

COCKLE LAW BRIEF PRINTING CO., (800) 225-6964
OR CALL COLLECT (402) 342-2831

7 pp

QUESTIONS PRESENTED

Sound recordings made by the official court reporter and withheld from the Petitioners are the subject matter of this Petition. Petitioners (collectively, "the Hankins") were sued by the Respondent for alleged breach of warranty in the sale of an airplane. They appealed an adverse jury verdict. When the complete Record was submitted to them, the Hankins discovered, among a large number of errors, three serious problems with the transcript: 1) an apparent gap in a witness' testimony; 2) material omissions from the testimony of two witnesses; and 3) highly prejudicial "testimony" the Hankins believe was never given at trial. The Hankins' appellate attorney – who had not represented them at trial – believes he has both the right and obligation as advocate and as an officer of the court to listen to the sound recordings upon which the appellate record was based. This case concerns the denial of the right of access to those sound recordings which are public records.

1. Access to a fair and impartial hearing before an appellate court is a fundamental right necessarily bottomed on a record above reproach. What level of scrutiny should be given the state action denying access to sound recordings upon which a meaningful hearing before an appellate court is based?

2. Given the appropriate standard of review, was the state action denying access to public records an unconstitutional abridgment of the Hankins' fundamental right of access to Mississippi's appellate courts?

PARTIES

The caption of this case sets out all parties. The corporate Petitioner, Jim Hankins Air Service, Inc., has no corporate parents or subsidiaries.

TABLE OF CONTENTS

Page

QUESTIONS PRESENTED i

PARTIES ii

TABLE OF CONTENTS iii

TABLE OF AUTHORITIES iv

CASE REPORTS 1

JURISDICTION 1

CONSTITUTIONAL PROVISIONS AND STATUTES ... 2

STATEMENT OF THE CASE 2

REASONS FOR GRANTING WRIT 16

I. INTRODUCTION 16

II. THE STANDARD OF REVIEW OF STATE ACTION IMPLICATING THE FUNDAMENTAL RIGHT OF ACCESS TO MISSISSIPPI'S COURTS SHOULD BE A HEIGHTENED STANDARD WHERE THAT ACTION MAY BE JUSTIFIED ONLY IF IT IS NARROWLY TAILORED TO ACHIEVE COMPELLING STATE INTERESTS 17

III. PROHIBITING THE HANKINS FROM LISTENING TO SOUND RECORD INGS OF THE TRIAL TO ENSURE THEIR RIGHT TO A FAIR AND IMPARTIAL APPELLATE HEARING ENCOMPASSES NO COMPELLING STATE INTEREST SUFFICIENT TO JUSTIFY THAT PROCEDURAL BURDEN ON THEIR ACCESS TO THE COURT 21

IV. CONCLUSION 27

TABLE OF AUTHORITIES

Page

CASES:

Boddie v. Connecticut, 401 U.S. 371, 91 S.Ct. 780, 28 L.Ed.2d 113 (1971) 18, 20, 22

Bounds v. Smith, 430 U.S. 817, 97 S.Ct. 1491, 52 L.Ed.2d 72 (1977) 17

Burdick v. Takushi, 504 U.S. 428, 112 S.Ct. 2059, 119 L.Ed.2d 245 (1992) 19

Connor v. Bogrett, 596 P.2d 683 (Wyo. 1979) 15

Douglas v. California, 372 U.S. 353, 83 S.Ct. 814, 9 L.Ed.2d 811 (1963) 18

Ex parte Hull, 312 U.S. 546, 61 S.Ct. 640, 85 L.Ed. 1034 (1941) 18

Griffin v. Illinois, 351 U.S. 12, 76 S.Ct. 585, 100 L.Ed. 891 (1956) 18, 22, 25

Hardy v. United States, 375 U.S. 277, 84 S.Ct. 424, 11 L.Ed.2d 331 (1964) 23, 24

Logan v. Zimmerman Brush Co., 455 U.S. 422, 102 S.Ct. 1148, 71 L.Ed.2d 265 (1982) 17, 18, 20, 22

Mathews v. Eldridge, 424 U.S. 319, 96 S.Ct. 893, 47 L.Ed.2d 18 (1976) 22

Roe v. Wade, 410 U.S. 113, 93 S.Ct. 705, 35 L.Ed.2d 147 (1973) 18

United States v. Selva, 559 F.2d 1303 (5th Cir. 1977) 23

STATUTES:

Miss. Code Ann. § 9-13-25 26

Miss. Code Ann. § 9-13-31 26

TABLE OF AUTHORITIES – Continued

Page

Miss. Code Ann. § 11-51-3 ..... 2, 22

Miss. Code Ann. § 25-59-19 26

Miss. Code Ann. § 25-61-1 ..... 2, 26

Miss. Code Ann. § 25-61-3 26

Miss. Code Ann. § 25-61-11 26

Miss. Code Ann. § 75-2-725 ..... 15, 16

Miss. Code Ann. § 9-4-3(1) 1

Miss. Code Ann. § 25-61-9 26

OTHER:

14 C.F.R. § 91.169 13

28 U.S.C. § 1257(a) 1

Mississippi Supreme Court, Rule 10 3

CASE REPORTS

Appendix A contains the order of the Supreme Court of Mississippi denying the writ of certiorari to the Court of Appeals of Mississippi, Hankins, et al. v. Melton, No. 92-CT-00710 COA (Miss. January 18, 1996) (Lee, C.J. dissenting from denial of petition for writ of certiorari). The opinion of the Mississippi Court of Appeals, by Mississippi Supreme Court rule, was not officially reported. That Court's decision is reproduced in the Appendix and is styled, Hankins et al. v. Melton, No. 92-CA-00710 COA (Miss.App. September 19, 1995). Also included in the Appendix is the order of the Supreme Court of Mississippi denying access to the trial's sound recordings.

JURISDICTION

This Court has jurisdiction pursuant to 28 U.S.C. § 1257(a). The Court of Appeals of Mississippi affirmed the trial court judgment in a decision issued September 19, 1995. The Hankins petitioned the Supreme Court of Mississippi to grant a writ of certiorari. The order denying that petition was entered on January 18, 1996. Also, one of the orders of which review is sought was that rendered by the Supreme Court of Mississippi on December 9, 1993, denying access to verbatim recordings of the trial.

The Petition before this Court is styled as a Petition for Writ of Certiorari to the Court of Appeals of Mississippi rather than to the Supreme Court of Mississippi. Under Mississippi law, all appeals from trial courts are to the Supreme Court. Miss. Code Ann. §§ 9-4-3(1) and

11-51-3 (Supp. 1995). Mississippi's Court of Appeals is a "diversionary" appellate court having no independent jurisdiction and hearing only those cases assigned by the Supreme Court of Mississippi. See Miss. Code Ann. § 9-4-3(1) (Supp. 1995).

CONSTITUTIONAL PROVISIONS AND STATUTES

Due to length, the pertinent text of these laws are set out in the Appendix and only cited here:

1. The Fourteenth Amendment to the Constitution of the United States of America.
2. Article 3, § 24 to the Constitution of the State of Mississippi.
3. Miss. Code Ann. § 11-51-3 (Supp. 1995), giving parties a right to appeal from final judgments to the Mississippi Supreme Court.
4. Mississippi Public Records Act of 1983, Miss. Code Ann. § 25-61-1 (1991), *et seq.*

STATEMENT OF THE CASE

The Hankins come before this Court because the orders of a Mississippi trial court and the Supreme Court of Mississippi denied them access to official sound recordings of the trial. The facts relating to the constitutional issue of access to the appellate court will be stated first. So that the Court will understand the context of the underlying dispute, the facts relating to the state law warranty issue will be stated second.

The Hankins appealed an adverse verdict. Because appellate counsel was not trial counsel, the Hankins each personally reviewed the transcript and made copious notes of the transcript's errors. Pursuant to Rule 10 of the Mississippi Supreme Court, the Hankins' appellate counsel moved the trial court to allow the Hankins access to the sound recordings so that a correct transcript could be ascertained.

As with other documents relating to the Hankins' efforts to verify the accuracy of the transcript, the Rule 10 motion to the trial court is not included in the Record. However, these documents are contained in a yellow folder maintained by the Clerk of the Supreme Court of Mississippi apart from the volumes containing the pleadings and transcript. In lieu of Record cites, these documents will be referred to by their style and dates. For the Court's convenience, the Hankins' second Motion to Supplement, which includes the list of errors and trial court order, is reproduced in the Appendix. The Clerk's yellow folder is labelled "92-CA-710."

The substance of the Hankins' complaints about the transcript are stated in the "Ex Parte Motion for Time to Correct Transcript," before the trial court. The Hankins asked for access to the original sound recordings of the trial proceedings to check against the errors in the transcript. The trial court, by order executed April 13, 1993, ordered the Hankins to submit a list of errors to the court by April 30, 1993. The court denied the Hankins access to the sound recordings.

On May 3, 1993, the Hankins' "Statement of Errors in Transcript of Trial" was submitted to the court, appellee,

and court reporter. Subsequently the court reporter noted 23 corrections to the transcript and it was then forwarded to the Supreme Court of Mississippi. The court reporter's corrections appear at the last unnumbered page of the hearing transcript.

The Court may be assured that the Hankins' counsel made every effort to make these documents part of the Record in this case. After the trial court denied the Hankins' new counsel access to the tapes, on "Motion to Supplement Record," filed October 20, 1993, before the Supreme Court of Mississippi, the Hankins again sought the sound recordings. On December 9, 1993, the Supreme Court of Mississippi forbade the Hankins access to the sound recordings.

With a second "Motion to Supplement Record," the Hankins moved, on January 14, 1994, to make their motion papers part of the pleadings volume so that the documents could be paginated and become part of the official record. The motion informed the Supreme Court of Mississippi that, along with the hearing on the state law merits, the Hankins intended to argue that the trial court's denial of access to the sound recordings was a denial of due process under the constitutions of the United States and Mississippi.

Without substantive comment, a panel of the Supreme Court of Mississippi denied that motion on April 7, 1994.

To be sure, most of the mistakes in the transcript noted by the Hankins are, taken individually, trivial. For example, at T. 106, line 26 should read "new" instead of "knew"; at T. 335, line 29, "sold it" should read "soloed";

or at T. 223, line 20 should read "Pratt and Whitney" not "Bratton Whitney ." Unlike jurists, court reporters are not compelled to be omnicompetent citizens.

However, the Hankins' list of errors, appended to both motions to supplement, runs more than six double-spaced pages. Aside from the Hankins' belief that so many errors impugn the integrity of the transcript, they believe that there are at least three highly prejudicial errors, even taken singly: two omissions from testimony and one insertion of language not believed by the Hankins to have been stated at trial. There may be other errors. The court reporter required more than five months to prepare the transcript of a two-day trial.

First, there is an apparent gap in the transcript at 143. The Respondent, Melton, was being cross-examined by the attorney representing the Hankins' eldest son. The context of this cross-examination was to establish that James, Jr., while owning the plane, had had no contact with Melton before the sale of the plane and made no representations to Melton about the airplane's condition. The attorney's next question is whether Melton looked to Jim, Sr., and Marian for advice and expertise. Melton responds, "That is correct." The transcript reflects the court interjecting for an afternoon recess. (T. 143)[1]

---

[1] Throughout the Petition, "T." will be used to indicate citations to the transcript of the trial. "C.P." will be used to indicate those materials contained in the Clerk's Papers, the pleadings volumes. This distinction has proved useful in Mississippi state court to alert the court to the nature of the material cited.

As a courtesy, lawyers in Mississippi customarily announce to the court that the attorney has no further questions for a witness. Further, given the context of the questioning, it seems unusual that no follow-up questions were asked about Melton's reliance on the Hankins' statements. The Hankins, in their Statement of Errors, state the belief that the transcript is "missing something. – Buffy Beach [Mr. Stephen L. Beach, III, Jim, Jr.'s attorney] never finished (Recess) What happened precisely? Re-Direct examination by Holland [Mr. James D. Holland, the Hankins' trial attorney]? (Something is missing?)"

Second, Melton's two experts testified about the value and mechanical condition of the aircraft, respectively. According to the Hankins' Statement of Errors, these experts both mentioned the plane's sunscreens – "windows" to the hoi polloi. This testimony related to the misunderstanding, discussed during the trial by Melton and Jim Hankins, Sr., over who would pay for the sunscreens' replacement at the time of the plane's purchase. (T. 21, 38, 361)

The third, and most serious, error believed by the Hankins to be contained in the transcript are some statements from Melton's direct examination concerning a "bid process" to sell the grounded plane. The Hankins believe these statements were inserted into the transcript and do not reflect the actual testimony. The remark about auctioning the plane was during direct examination to establish that Melton mitigated his damages and to state what his damages were:

> Q. So, Mr. Melton, when you sold the plane, you sold it for salvage; is that correct?

A. I sold it for $63,700.

Q. Who did you sell this plane to? Do you remember?

A. I don't specifically remember. I remember that I contacted the attorneys to make sure that it was someone who was in the plane maintenance business who understood the problems with the plane and what they would actually be buying . . . The first step was to notify Trustmark Bank that their asset was no longer airworthy . . . I had a responsible (sic) to let them know that it was not working and that I would have the note satisfied, and to get their permission to sell it.

* * *

Q. Mr. Melton, why did you sell it to someone in the business of airplanes?

A. Because I needed to have the personal assurances that it would be someone who clearly understood that the plane was unairworthy, that the engines were in trouble, that the engines needed to be repaired, to make sure that it didn't go to an individual like myself who is not a pilot, not a mechanic, who just wouldn't know what the problems were. And I was very candid with the attorneys about insuring that the individual that bought the plane or the company knew the mechanical problems, and I was satisfied that that had been done. **It was done on a bid basis.**

Q. Mr. Melton, you've raised an issue just then about ownership?

(T. 59-60) (emphasis supplied)

On cross-examination the Hankins' attorney asked Melton whether he remembered Jim Hankins, Jr., offering him more than $63,700:

> A. I vaguely remember that from two perspectives, Mr. Holland. First of all, I think that we had already **set up a process bid on the plane** and I had made an agreement. It is a fact that somebody did offer me more money for the plane after I made an agreement to sell it. I did not take the offer because of the ethics of the agreement that I made with the person that was gonna (sic) buy it. I don't know how much more of the 63 it was, but I made a deal to sell it.
>
> Secondly, I was not comfortable in putting this airplane back in the hands of the Hankinses, because I had no assurances that this plane wasn't going to be sold to another individual like me. I had none.

(T. 136-37) (emphasis supplied)

The Hankins are avid about testimony regarding any "bid process" having been inserted because the circumstances surrounding the sale of the plane had been so contentious. Those earlier events would have made Melton's trial testimony on the subject memorable, the Hankins believe. Earlier in the proceedings Melton had asked the trial court for its approval to sell the plane to Turbine Power, Inc., on March 21, 1988. The relevant part of that motion reads as follows:

> 3. Plaintiff has . . . received an offer for the purchase of the subject aircraft, and is

desirous of accepting said offer. A copy of which is attached hereto as Exhibt (sic) "A."

4. As of the date of this filing, an offer to purchase said aircraft has been made to each defendant, at terms no less advantageous than those contained in Exhibit "A." To date said offer has not been accepted.

(C.P. 139-40)

Melton's averment in the pleadings that the plane had been offered to the Hankins is at variance with his later testimony. Further, there is no "bid process" mentioned in Melton's motion other than in reference to offering it to the Hankins. The Hankins' responsive pleading, filed with the trial court on March 23, 1988, denied any "offer" to sell them the plane had been made:

1. The notice of said motion was not filed until March 21, 1988, and set for hearing on March 24, 1988. These Defendants have not been given the opportunity to fully prepare for said motion hearing nor have they been given appropriate notice under the Local Rules.

2. The Defendants deny the separate paragraph allegations of the motion of Frank Melton relating to the sale of a certain King Air aircraft.

3. The terms of said sale were not made available to the Defendants until March 21, 1988, by hand-delivery late in the afternoon. The Defendants have not had an opportunity to

review said offer, to the extent said (sic) exists.

* * *

5. The Defendants understand and believe that the Plaintiff is selling said aircraft for salvage at a price far below its value.

(C.P. 145)

On March 24, 1988, the trial court entered an order permitting the sale and reciting as "fact" that Melton had made offers to sell to each defendant which had not been accepted. (C.P. 148) This order, while not containing the customary notation of the attorney preparing it, is in the typeface used by Melton's attorneys. The Hankins immediately filed an objection and motion for rehearing:

1. In a telephone conversation with Mel Priester, one of the attorneys for the Plaintiff, on March 22, 1988, the undersigned was informed that the hearing would not take place on Thursday, March 24, 1988. The notice of hearing did not provide the requisite time period to prepare for the motion and the undersigned had previously scheduled to be out of the state on that date.

2. The Defendants did file objections to not only the hearing, but to the motion of the Plaintiff in relation to the sale of the aircraft.

3. The Defendants had the honest belief that the hearing would not occur on March 24, 1988, but would occur after approximately 10:00 a.m. on March 25, 1988, at the convenience of the Court and the Plaintiff.

(C.P. 150)

After the conclusion of the briefing, the Supreme Court of Mississippi, on order filed January 20, 1995, assigned the Hankins' appeal to the Court of Appeals of Mississippi. This order also is contained in the Clerk's yellow folder. In dealing with the constitutional issue raised by the Hankins, the Court of Appeals said:

> Hankins contends that the trial court erred when it refused to allow him to duplicate the trial tapes and that such refusal is an unconstitutional denial of due process.
>
> * * *
>
> The record indicates that after Hankins filed the "Statement of Errors in Trial Transcript" with the trial court, the court reporter reviewed the trial transcript and tapes and made the necessary changes. Upon reviewing page 143, we found that all this page reveals is a recess following the cross-examination of Melton, followed immediately by his re-direct examination. Appellants have not suggested or demonstrated any errors or omissions which remain in the transcript, nor any damage done to their appeal as a result of any errors or omissions in the trial transcripts.
>
> "The standard of review of a post-trial motion is abuse of discretion." Johnson v. State, 642 So.2d 924, 928 (Miss. 1994) (other citations omitted). As such, Hankins was required to show an abuse of discretion, which he failed to prove. This assignment of error is without merit.

Slip op. at 12.

The Hankins timely petitioned for rehearing before the Court of Appeals. They stated both state law grounds

for reversal as well as reiterating that state action was being challenged requiring a level of scrutiny fundamentally different from an "abuse of discretion" review. The petition was denied by order of that court filed on November 28, 1995. The Hankins then petitioned the Supreme Court of Mississippi for writ of certiorari to the Court of Appeals. By order filed January 18, 1996, that petition was denied.

Turning now to the facts underlying the state law issues, Melton had been leasing aircraft from Hankins Air Service and believed that buying an airplane might enhance his personal and professional lives. (T. 8, 9, 19) Melton and his company's financial analyst, Duane Lebl, met with the Hankins on several occasions to investigate whether Melton or his business, WLBT TV-3, Inc., could afford the airplane. (T. 156)

Lebl and Melton were concerned about whether the plane would have any expensive repairs early on and asked Hankins if he expected any "big ticket" items in the near future. Jim Hankins told them that he, Hankins, did not anticipate any expensive repairs in the near future. Melton admitted that Hankins had told him that the next significant repair he could expect would be on the "hot sections." (T. 97, C.P. 218) He also admitted that Hankins had told him before his purchase that the cost of repairing the hot sections would vary depending on the exact nature of the repairs but that the cost would be in the neighborhood of $30,000.00. (T. 104) "Hot section" is an aviation term of art referring to the combustion chambers in gas turbine engines.

There is no dispute in this case that both Frank Melton and Duane Lebl were told that the airplane's engines had about 5400 hours on them at the time of sale and that the manufacturer **recommended** overhaul at 3500 hours. (T. 93-94, 174) Lebl admitted that none of the Hankins ever told him that the engines had been overhauled at 3500 hours. (T. 173)

Melton has contended that he was never told that no overhaul had been done. This is factually impossible: Lebl admitted that he "was told that the plane had too many hours between inspections or between overhauls to use it in an (sic) air taxi. . . . " (T. 160; Exhibit 13) The first page of Exhibit 13, Lebl's contemporaneous notes, unequivocally states "Cannot use in air taxi – regulations regarding total hours." On the Exhibit, the word "total" has been struck through. The next line says "can go 12,000 hrs" with the next line reading "recommend 3,500 hrs between overhauls." Adjacent to this remark, in smaller print, is "for air taxi."

Melton and Lebl's testimony and Lebl's notes show that he and Melton knew the airplane could not be used as an air taxi because the engines had not been overhauled. It is logically impossible that Lebl and Melton could then conclude that the aircraft also had received an overhaul – which would have permitted its use as an air taxi. (Trial Exhibit 13)

To reflect the plane's low value at the time of sale and its defectiveness at the time of sale, Melton called an expert airframe and power plant mechanic. The expert, George Watson, testified that federal regulations, 14 C.F.R. § 91.169, require aircraft of the kind at issue be

inspected under a program selected by the aircraft owner from five available options. The parties' experts agreed that any discrepancies found during inspection must be repaired. (T. 225, 328) The parties' experts also agreed that not overhauling the engine at 3500 hours violated no federal regulation. (T. 245, 329)

Watson testified that he had certified craft as airworthy even when the craft was over the manufacturer's **recommended** time between overhauls ("TBO"). (T. 240-41) Watson claimed that he would approve such craft only where the manufacturer had provided information through a service bulletin extending the TBO. Hankins' attorney then handed Watson a copy of a bulletin from Pratt & Whitney, the manufacturer of the turbines at issue in this case, stating that TBO could vary from 3500 hours to 8600. (T. 242) Consequently, there was no evidence in the record to indicate that the plane was not airworthy at the time of sale.

Seven months after Melton bought the airplane, his pilot, an FAA certified air frame and power plant mechanic and the Hankins' son, Michael Hankins, grounded the plane pending repair of the "hot sections" of the gas turbines. (T. 49) The near future came too soon for Melton and he sued the Hankins and their corporation on October 8, 1986 for, *inter alia*, breach of warranty.

Following a trial on these facts, the jury, by general verdict, found Jim Hankins, Sr., Marian Hankins, and Hankins Air Service, Inc., liable to Melton in the amount of $75,000.00. (C.P. 327) The Hankins remain confident

that the verdict and the Court of Appeals' affirmance are "merely wrong" as a matter of state future warranty law.[2]

---

[2] If Hankins' statement was any kind of warranty and not an opinion, it would have to be a warranty of future performance. In *Connor v. Bogrett*, 596 P.2d 683 (Wyo. 1979), the Wyoming Supreme Court held that where neither buyer nor seller had the power to actually control the future events upon which the buyer based his claim for an express warranty, the possibility that the prediction would be incorrect is assigned to the buyer. Obviously, Hankins had no control over the number of hours Melton flew.

The Wyoming Court pointed out that as a matter of policy, warranties of future performance, as distinguished from warranties of present fact, must be explicit. The UCC's statute of limitations relating to warranties provides that "[a] breach of warranty occurs when tender of delivery is made, except that where a warranty explicitly extends to future performance of the goods and the discovery of the breach must await the time of such performance. . . . " Miss. Code Ann. § 75-2-725, as amended.

In this case, Jim Hankins stated that he did not expect any expensive repairs in the near future. Such a statement cannot, as a matter of law, be considered an express statement of warranty for a particular time extending in the future. For example, in *Crouch v. General Elec. Co.*, 699 F.Supp. 585 (S.D.Miss. 1988), Mr. Crouch had been injured in a helicopter crash while serving in the Army. GE delivered the helicopter engine on February 27, 1981; the crash occurred in August of 1981. Crouch sued on August 21, 1987. The district court recited the usual rule: a claim sounding in warranty accrues upon tender of delivery. Even under Mississippi's former forum-shopping bait, the six year statute of limitations, the claim appeared barred. *Id.* at 593.

The Crouches contended that the warranty was for future performance therefore tolling the statute under the exception quoted *supra*, Miss. Code Ann. § 75-2-725(2). GE's warranty

REASONS FOR GRANTING WRIT

I. INTRODUCTION

The compelling reason for hearing this case is that the Court of Appeals of Mississippi ventured far from accepted practice by reviewing a constitutional challenge to state action as an appeal of a post-trial motion. The court purported to apply an "abuse of discretion" standard. The Court of Appeals of Mississippi also decided an important question of federal law which has not been, but should be, decided by this Court. That question is whether the refusal of the state, by court order, to permit the Hankins – and their newly-hired appellate counsel

---

stated that "at the time (of) delivery (the engines will) be free from defects in material and workmanship. . . . The warranty on each of the . . . engines shall cease three (3) years from the date the Government accepts the first engine. . . . " *Id.* at 593. The district court concluded that a warranty of materials and workmanship guaranteeing repair or replacement for a specified time was not an express warranty of actual engine performance.

This was so because the " 'overwhelming majority' of courts have interpreted future performance exceptions such as those contained in section 75-2-725 very strictly. (citations omitted) To come within the future performance exception, a warranty must explicitly promise or guarantee future performance of the goods; it must be clear, unambiguous and unequivocal." *Id.* at 594; see cases cited at 594-95. See also, *e.g.*, *Western Recreational Vehicles, Inc. v. Swift Adhesives, Inc.*, 23 F.3d 1547 (9th Cir. 1994); *Mountain Fuel Supply Co. v. Central Engineering & Equip. Co.*, 611 P.2d 863 (Wyo. 1980); Annotation, *What constitutes warranty explicitly extending to "future performance" for purposes of UCC § 2-725(2)*, 93 A.L.R.3d 690 (1979).

– access to public records is a denial of due process under the circumstances of this case.

The constitutionally-protected access to Mississippi's appellate courts is bottomed on a complete and accurate record. The Hankins believe that they were denied a fair and impartial hearing before the appellate court because of gross errors in the transcript. Access by new counsel to the sound recordings would have shown whether the transcript, as the Hankins believe, omitted some testimony and inserted statements not made.

The question takes on additional significance where modern technology provides the potential availability of many different forms of electronic recording. Apart from raising an important issue of federal law with potentially widespread effect on civil and criminal appeals, this case will likely have effect into the technological future.

II. THE STANDARD OF REVIEW OF STATE ACTION IMPLICATING THE FUNDAMENTAL RIGHT OF ACCESS TO MISSISSIPPI'S COURTS SHOULD BE A HEIGHTENED STANDARD WHERE THAT ACTION MAY BE JUSTIFIED ONLY IF IT IS NARROWLY TAILORED TO ACHIEVE COMPELLING STATE INTERESTS.

Access to courts is a fundamental right guaranteed by the Fourteenth Amendment to the Constitution of the United States. *Logan v. Zimmerman Brush Co.*, 455 U.S. 422, 102 S.Ct. 1148, 71 L.Ed.2d 265 (1982) (access to state's adjudicatory mechanisms species of property); *Bounds v. Smith*, 430 U.S. 817, 97 S.Ct. 1491, 52 L.Ed.2d 72 (1977) (protection of prisoner's right to court access requires

provision of sufficient legal materials); *Boddie v. Connecticut*, 401 U.S. 371, 91 S.Ct. 780, 28 L.Ed.2d 113 (1971) (actions which are the equivalent of denying use of adjudicatory procedures unconstitutional); *Ex parte Hull*, 312 U.S. 546, 61 S.Ct. 640, 85 L.Ed. 1034 (1941) (parole board's "approval" of habeas petitions unconstitutional infringement of right of access to court). Where the state provides for appellate review, that is also a protected fundamental right. *Bounds*, 430 U.S. 817; *Douglas v. California*, 372 U.S. 353, 83 S.Ct. 814, 9 L.Ed.2d 811 (1963); *Griffin v. Illinois*, 351 U.S. 12, 76 S.Ct. 585, 100 L.Ed. 891 (1956).

The Court's civil cases, such as *Logan* and *Boddie*, illustrate that there is no analytical difference between the civil and criminal cases. As a property and liberty interest, access to courts is a fundamental right. Traditionally, the Court has viewed state action restricting or regulating fundamental rights with careful scrutiny, if not suspicion.[3] For example, in *Roe v. Wade*, 410 U.S. 113, 155, 93 S.Ct. 705, 728, 35 L.Ed.2d 147 (1973), the Court said that "[w]here certain 'fundamental rights' are involved, the Court has held that regulation limiting these rights may be justified only by a 'compelling state interest,' (citations omitted) and that legislative enactments must be narrowly drawn to express only the legitimate state interests at stake. (citations omitted)"

---

[3] The Court of Appeals of Mississippi reviewed the trial court's order prohibiting access to the sound recordings as it would a post-trial motion. It is beyond peradventure that a court's order is a action of the state within the Fourteenth Amendment. *Shelley v. Kraemer*, 334 U.S. 1, 68 S.Ct. 836, 92 L.Ed. 1161 (1948).

Thus, the analysis has depended on identifying what state interest underlies its action and whether that interest was sufficiently compelling to support regulation of fundamental rights. More recently, however, the Court appears to have adopted a "sliding scale" analytically depending not so much on the nature of the state's interest, but on the nature and severity of the state's regulation.

For example, in *Burdick v. Takushi*, 504 U.S. 428, 112 S.Ct. 2059, 119 L.Ed.2d 245 (1992), the Court reviewed whether Hawaii's ban on "write-in" voting passed constitutional muster. The Court held that a more flexible standard than pure "strict scrutiny" applied, at least in election law cases.

> [T]he rigorousness of our inquiry into the propriety of a state election law depends upon the extent to which a challenged regulation burdens First and Fourteenth Amendment rights. Thus, as we have recognized when those rights are subjected to "severe" restrictions, the regulation must be "narrowly drawn to advance a state interest of compelling importance." (citation omitted) But when a state election law provision imposes only "reasonable, nondiscriminatory restrictions" upon the First and Fourteenth Amendment rights of voters, "the State's important regulatory interests are generally sufficient to justify the restrictions. (citations omitted)"

Id., 112 S.Ct. at 2063-64.

Thus, the level of scrutiny is a balancing process, weighing the severity of the regulation and resulting infringement of the fundamental right against the state's interest in making order from chaos to achieve a civil

republic. As a common law court, the Court and its officers share the duty of discerning the appropriate rule to follow under the circumstances of each case.

Interestingly, the cases considering state action affecting access to courts rarely speak of the standard of review. Where the level of scrutiny is mentioned, the Court appears to have applied strict scrutiny. "[D]ue process requires . . . that absent a countervailing state interest of overriding significance, persons forced to settle their claims of right and duty through the judicial process must be given a meaningful opportunity to be heard." *Boddie*, 401 U.S. at 377, 91 S.Ct. at 785.

Similarly, in *Logan* the Court quoted *Boddie* and said, "having made access to the courts an entitlement or a necessity, the State may not deprive someone of that access unless the balance of state and private interests favors the government scheme." *Logan*, 455 U.S. at 430, fn. 5, 102 S.Ct. at 1154-55, fn. 5 (Blackmun, J., speaking for the Court).

In recent years, the Court appears to be signaling that "strict scrutiny" is analytically appropriate to many cases, yet is actually only the harsher end of a flexible equation. Thus, in appropriate circumstances there would be no distinction between saying that a burden on a fundamental right may only be justified by a balance of interests favoring the state's action and that only a compelling state interest can justify burdening fundamental rights. Doubtless, Learned Hand could have written an elegant algebra expressing this idea.

In this case, the burden on access to a fair and impartial hearing before an appellate court was the court-ordered prohibition on the Hankins' listening to sound recordings of the trial. The recordings form the basis of the transcript upon which access to the appellate court is founded. State action placing any burden on access to appellate review must be justified by the balance of interests favoring the court-ordered restriction on access to the sound recordings.[4]

III. PROHIBITING THE HANKINS FROM LISTENING TO SOUND RECORDINGS OF THE TRIAL TO ENSURE THEIR RIGHT TO A FAIR AND IMPARTIAL APPELLATE HEARING ENCOMPASSES NO COMPELLING STATE INTEREST SUFFICIENT TO JUSTIFY THAT PROCEDURAL BURDEN ON THEIR ACCESS TO THE COURT.

The question is whether, under the circumstances of this case, refusing access to tape recordings of the trial was an unconstitutional burden on access to appellate review. In the first instance, Mississippi's Constitution of 1890 provides a right of access to a fair and impartial hearing in Article 3, § 24. Mississippi also provides for appellate review as a matter of right, Miss. Code Ann.

---

[4] In briefing before the state courts, the Hankins contended that the trial court's action prohibiting access to the sound recordings of the trial bore no reasonable relation to state interests. When the Court of Appeals of Mississippi purported to apply an "abuse of discretion" standard to a constitutional challenge, the Hankins raised the issue of the standard of review again before the Supreme Court of Mississippi on petition for writ of certiorari.

§ 11-51-3 (Supp. 1995). Mississippi's evident policy in providing review of trial courts is to maintain its civil society by assuring all citizens a check on arbitrary government by the judicial branch.

"[D]ue process requires, at a minimum, (that) persons forced to settle their claims of right and duty through the judicial process must be given a meaningful opportunity to be heard." *Boddie*, 401 U.S. at 377, 91 S.Ct. at 785. Of course, the type of hearing and its timing must be appropriate under the circumstances. *Logan*, 455 U.S. at 434, 102 S.Ct. at 1157; *Mathews v. Eldridge*, 424 U.S. 319, 96 S.Ct. 893, 47 L.Ed.2d 18 (1976).

In this case, the peculiar nature of the appellate hearing must be considered. The nature of an appellate court's "hearing" is a mature consideration of the record before it. The Hankins' factual argument is that the number of errors noted by the court reporter, and the number which remain, *prima facie* impugn the transcript. A corrupt record cannot provide the constitutionally required hearing. Forty years ago the Court held that due process required access to the appellate court be protected by some constitutionally-sufficient method of reporting the trial proceedings to the appellate tribunal. *Griffin v. Illinois*, 351 U.S. 12, 76 S.Ct. 585, 100 L.Ed. 891 (1956).

In *Griffin*, the Court held that access to the appellate tribunal could not be so burdened as to preclude effective review. Illinois, though providing appellate review of right, also required a transcript but declined to waive the required fees to indigent criminal defendants. Extensive research, both electronic and traditional, indicates that

the question of whether access to sound recordings of public trials may amount to a denial of due process is one of first impression. There *are*, however, numerous cases from the Courts of Appeals which consider whether a transcript containing some omissions is *per se* a violation of due process as infringing on the right of access to the court. See, e.g., Annotation, *Court Reporting – Omissions*, 12 A.L.R. Fed. 584.

As an illustration of the level of protection of the records before them that courts have demanded, the Fifth Circuit's *United States v. Selva*, 559 F.2d 1303 (5th Cir. 1977), is typical. Selva contended that his newly-retained appellate counsel could not examine a transcript of the entire proceedings because the court reporter's recording device failed. The United States Court of Appeals believed that even though the appellant could offer no specific error in the unrecorded proceedings, his new appellate lawyer would be foreclosed from examining the transcript for possible errors. The Court held that these circumstances would "render illusory his right to appeal." *Id.* at 1305.

The Courts of Appeals have never required a perfect record. *E.g., Selva*, 559 F.2d at 1306, fn. 5. Nor do the Hankins suggest the Court adopt such a rule. The question is what level of protection should be afforded the record to ensure a fair and impartial appellate review.

This Court, in *Hardy v. United States*, 375 U.S. 277, 84 S.Ct. 424, 11 L.Ed.2d 331 (1964), eschewed the constitutional issues, and dealt with the question of protecting an

appellant's access to the federal court where new counsel is engaged on appeal:

> [W]hen, as here, new counsel represents the indigent on appeal, how can he faithfully discharge the obligation which the court has placed on him unless he can read the entire transcript? His duty may possibly not be discharged if he is allowed less than that. . . . The right to notice "plain errors or defects" is illusory if no transcript is available at least to one whose lawyer on appeal enters the case after the trial is ended.

Hardy, 375 U.S. at 279-80, 84 S.Ct. at 426-427.

The reasoning of this passage is unchanged by substituting "when, as here, new counsel represents a party on appeal, how can he faithfully discharge his obligations to the court and his clients unless he is able to assure a reasonably accurate transcript?" The Hankins do not propose that parties be able to manufacture such circumstances by sequentially employing a clutch of lawyers.

Nevertheless, the Hankins' appellate counsel's simultaneous duties to his clients and the court were rendered untenable in this case when the courts refused access to verbatim recordings. This is so because the appellate hearing relies on those recordings and his client stated, under oath, that she had no memory of certain words appearing in a transcript having been said at trial. Motion to Supplement Record, filed with the Supreme Court of Mississippi October 20, 1993, Exhibit B, affidavit of Marian Hankins.

Justice Frankfurter, concurring in *Griffin*, said that the state could not deny review

> merely by disabling (a defendant) from bringing to the notice of an appellate tribunal errors of the trial court which would upset the conviction were practical opportunity for review not foreclosed. . . . To sanction such a ruthless consequence, inevitably resulting from a money hurdle erected by a State, would justify a latter-day Anatole France to add one more item to his ironic comments on the "majestic equality" of the law.

Griffin, 351 U.S. at 23, 76 S.Ct. at 593 (Frankfurter, J., concurring).

The Mississippi courts disabled the Hankins' new appellate counsel from bringing notice of errors to the appellate tribunal by refusing access to verbatim sound recordings. This is not a case where it is possible for counsel to show a specific error, except those based on his clients' memories and the extant shoddy transcript. Because the omitted testimony concerns damages, the Hankins can certainly show that, if their memories are correct, they were prejudiced. If statements were inserted, there has been a fraud on the court.

Given the standard of review, the denial of the trial's verbatim sound recordings, under the circumstances of this case, is an unduly harsh restriction on counsel's ability to faithfully perform his obligations to the court and his clients. The enforced unavailability of the recordings rendered illusory counsel's ability to provide the appellate tribunal notice of errors.

In the balance is whether the refusal of the Mississippi courts to allow access to the recordings reflects an overriding state interest. The sound recordings at issue are public records by delaration of the Mississippi Public Records Act of 1983, Miss. Code Ann. § 25-61-1 *et seq.* Section 25-61-3(b) (1991), defines "public records" as

> all . . . tapes, recordings or reproductions thereof, and any other documentary materials, regardless of physical form or characteristics, having been used, being in use, or prepared, possessed or retained for use in the conduct, transaction or performance of any business, transaction, work, duty or function of any public body, or required to be maintained by any public body.

"Public body" is defined as "any department . . . agency and any other entity of the state or a political subdivision thereof . . . and any other entity created by the Constitution or by law. . . . " Miss. Code Ann. § 25-61-3(a) (1991). Mississippi's judicial department is undeniably an entity of the state and a constitutional creature. Mississippi Constitution of 1890, Article 6. The judiciary is not excluded from the definition section and recording all evidence in trial proceedings is required by Miss. Code Ann. § 9-13-25 (1991) and § 9-13-31 (1991). These recordings are public property pursuant to Miss. Code Ann. § 25-59-19 (1991).

The statute decrees that the state has no interest in prohibiting access to the "tapes (and) recordings." Access to public records is not, of course, unbounded. Other sections of the statute recognize circumstances, none of which apply here, where access to public records may be

lawfully restricted or denied. See, e.g., Miss. Code Ann. §§ 25-61-9 and 25-61-11.

Pursuant to the statute, a court could order reasonable time, place, and manner restrictions on access to its documents. In this case, the denial was absolute and contrary to expressly stated public policy.

IV. CONCLUSION

This Court has historically been astute to guard access to the appellate process. A society which "guards its guardians" with checks and balances on judicial process should not permit that process to be undermined. The constitutional vice of the Mississippi courts' insensitivity to counsel's ability to demonstrate errors is manifest. The courts of Mississippi burdened the right to access to appellate hearing with a restriction on access to verbatim records. Where there is no state interest – compelling or otherwise – to support such a burden, this Court should grant certiorari to settle an important question of constitutional law.

Respectfully submitted,

T. Jackson Lyons
Standard Life Building
206 West Pearl Street
Jackson, Mississippi 39201
Tel. 601/352-0330
Fax 601/969-1402
E-mail legalres@teclink.net
Mississippi Bar #8988
Counsel of Record for Petitioners

Thomas J. Lowe, Jr.
P.O. Box 2050
Jackson, Mississippi 39225
601/354-1027

IN THE SUPREME COURT OF MISSISSIPPI

NO. 92-CT-00710 COA

JAMES A. HANKINS, SR., MARIAN HANKINS, AND JIM HANKINS AIR SERVICE, INC.

v.

FRANK E. MELTON

ORDER

(Filed Jan. 18, 1996)

This matter comes before the Court on the Petition for Writ of Certiorari filed by James A. Hankins, Sr., Marian Hankins and Jim Hankins Air Service, Inc. After consideration, the Court finds that the Petition for Writ of Certiorari should be denied.

IT IS THEREFORE ORDERED that the Petition for Writ of Certiorari be, and hereby is denied.

SO ORDERED, this, the 11th day of January, 1996.

/s/ Lenore L. Prather
LENORE L. PRATHER,
PRESIDING JUSTICE
FOR THE COURT

PRATHER AND SULLIVAN, P.JJ., PITTMAN, BANKS, MCRAE, ROBERTS, SMITH AND MILLS, JJ., WOULD DENY.

LEE, C.J., WOULD GRANT.

IN THE COURT OF APPEALS
OF THE STATE OF MISSISSIPPI

NO. 92-CA-00710 COA

JAMES A. HANKINS, SR., MARIAN HANKINS, AND JIM HANKINS AIR SERVICE, INC. — **APPELLANTS**

v.

FRANK E. MELTON — **APPELLEE**

THIS OPINION IS NOT DESIGNATED FOR PUBLICATION AND MAY NOT BE CITED, PURSUANT TO M.R.A.P. 35-B

TRIAL JUDGE:	HON. ROBERT LEWIS GIBBS
COURT FROM WHICH APPEALED:	HINDS COUNTY CIRCUIT COURT
ATTORNEY FOR APPELLANTS:	THOMAS J. LOWE, JR.
ATTORNEY FOR APPELLEE:	JOSHUA J. WIENER
NATURE OF THE CASE:	BREACH OF WARRANTY AND FRAUD
TRIAL COURT DISPOSITION:	GENERAL VERDICT AND DAMAGES FOR MELTON

BEFORE FRAISER, C.J., KING, AND McMILLIN, JJ.

KING, J., FOR THE COURT:

Frank E. Melton brought suit in the Circuit Court of Hinds County against James Hankins, Sr., Marian Hankins, Jim Hankins, Jr., and Jim Hankins Air Service, Inc., alleging fraud and breach of express and implied warranties covering a used Beachcraft King Air B-90 airplane.

From a jury award favoring Melton, Marian Hankins, James Hankins, Sr., and Jim Hankins Air Service perfected this appeal.

I.

In January or early February of 1985, Frank E. Melton, President and Chief Executive Officer of WLBT-TV, needed air transportation to travel from Jackson, Mississippi to Tyler, Texas. Melton, unable to find appropriate accommodations on the traditional airlines, searched the phone book for a charter airline. During that search, Melton located Jim Hankins Aviation Services and used it for that particular trip. Because Melton was satisfied with the way the pilot handled himself on that flight, he began utilizing Jim Hankins Aviation Services regularly.

On one particular flight, Melton experienced a bumpy ride on a small airplane chartered by Jim Hankins Air Service and expressed his displeasure to James and Marian Hankins. Melton was then introduced to a larger airplane, a used Beachcraft King Air B-90, the subject of this litigation. Melton was pleased with the King Air's performance and began using it exclusively.

On several trips in and out of the airport, Marian Hankins approached Melton to talk about the possibility of selling the King Air. Although very pleased with the King Air, Melton informed Marian that he had no interest in purchasing an airplane. However, after traveling exclusively on the King Air for 30 or 40 days, Melton decided to talk to the Hankins about purchasing the airplane.

During the negotiation phase, James Hankins provided Melton with "facts and figures" regarding the costs of maintenance, repair and operation of the airplane. Both Marian and James Hankins told Melton that the King Air was a "good, dependable airplane." James Hankins asserted that the airplane would require no big ticket maintenance items in the near future "[o]n at least four occasions in [Melton's] presence."

Duane Charles Lebl, Jr., a financial analyst at WLBT during the negotiation period, first met with James and Marian Hankins in April of 1985, at Jim Hankins Air Service, to try "to figure out if it was worth looking into purchasing a plane." At that meeting, the Hankins told Lebl that the airplane was a "good airplane." Lebl "was led to believe that there were gonna be no big ticket items [in the near future]"; and "that the only maintenance the plane needed was routine maintenance." Lebl "left the meeting with the impression that, really, all [he] needed to worry about was routine cost."

Of the several meetings with James and Marian Hankins, Lebl particularly remembered the meeting which took place at WLBT to "discuss the economics of purchasing a plane, operating a plane." At that meeting, the parties again discussed the fact that there "were no big ticket items coming up in the near future" and that "all the maintenance that [they] should expect on a plane would be routine maintenance." James and Marian Hankins represented the King Air "to be in really good shape." The King Air "was represented as being a very good plane, that it had been well maintained and was in excellent condition."

On July 23, 1985, Melton purchased the King Air from Marian and James Hankins' son, Jim Hankins, Jr., for $198,000,[1] and executed a promissory note to Trustmark for $177,300 for the purchase. Melton hired Michael Stephen Hankins, Jr., also the son of James and Marian Hankins, as his chief pilot.

On February 29, 1986, Michael grounded the airplane for its annual inspection. In May of 1986, three months after the plane had been grounded, Michael gave Melton a list of seventeen items that had to be replaced or repaired on the King Air to make it airworthy. The list included new hot sections for the engines. Melton met with James Hankins to discuss the necessary repairs needed to make the King Air airworthy. During that meeting, James Hankins suggested that Melton sell the airplane.

After Melton's meeting with James Hankins, Marian Hankins contacted Melton "a number of times on the telephone wanting permission to place ads in magazines." She reminded Melton of an "agreement with them, that [he] would give them the first right to buy back the plane." During one of those conversations, Marian Hankins told Melton that "the engines needed to be overhauled and that [Melton] might want to consider letting them find him some mid-time engines," which would cost approximately $175,000. After Jim Jr. offered to buy the plane back from Melton for $5,000, Melton

---

[1] Although Melton thought that the King Air was owned by Jim Hankins Air Service, Inc., he later learned that Jim Hankins, Jr. owned the airplane. The jury found in favor of Jim Hankins, Jr.

moved the airplane from the Hankins' hangar to Welch's hangar to secure it.[2]

On October 8, 1986, Melton filed a complaint against James Hankins, Marian Hankins, Michael Stephen Hankins,[3] and Jim Hankins Air Service, alleging fraud and breach of express and implied warranties. Melton requested judgment against the defendants, jointly and severally.

In their answer, the defendants asserted inter alia that 1) the King Air was not defective and was reasonably fit and suitable for its intended purposes, and that 2) express or implied warranties are inapplicable to the instant case. The defendants asserted affirmatively that any defect in the used aircraft was either caused by or known to Melton, or should, in the exercise of reasonable care, have been known by him, and that Melton was guilty of negligence in purchasing and continuing to use the airplane without correction and such negligence was the sole proximate cause of Melton's loss or damage.

On February 17, 1987, Melton filed an amended complaint and added Jim Hankins, Jr. as a defendant. On March 24, 1988, the trial court entered a modified order authorizing Melton to sell the King Air.[4] On December 22,

---

[2] Melton explained that after the plane was grounded, Hankins left it on the runway, where it was susceptible to weather conditions, instead of taking it back into the storage.

[3] On March 28, 1990, defendant, Michael Stephen Hankins, was dismissed pursuant to an agreement by the parties.

[4] The plane was sold prior to trial for $63,700.

1988, the Hankins moved for summary judgment, which was denied.

At the trial, which commenced on April 1, 1992, Melton testified to many of the facts noted here. His testimony was corroborated by Lebl. In addition, Joe Bryon Tolbert, a pilot owning a charter business in Tyler, Texas, testified as an expert witness on the appraisal of airplanes. Tolbert testified that when he inspected the King Air in May or June of 1986 after it was grounded, the maintenance records showed that it had never had an overhaul. At that time, the airplane had about 5,500 or 5,600 hours of flight time. The manufacturer recommended that the engines be overhauled at 3,500 hours. Tolbert valued the airplane as being worth "$32,000, $35,000" and explained that an "overhaul would run somewhere between $60,000 and $80,000 each."

George Watson, an expert in aviation mechanics, testified to his opinion that the King Air's engines should have been overhauled 2,000 hours prior to its sale to Melton. Watson explained that:

> [The] plane was maintained under the manufacture's recommended procedures according to the log books. So they should have – it should have been maintained – if you're going to follow some of them, you need to follow all of them. If you are not going to do the manufacturer's program, then you should have your own program or whatever.

Watson admitted, however, that because there was no indication in the log books that James or Marian Hankins owned the King Air, there was also no indication in relation to the log books and the regulations that Marian,

James, or Jim Hankins Air Service was responsible under the regulations to maintain the King Air.

As the plaintiff's final witness, Marian Hankins, called as an adverse witness, gave testimony on the disposition of the proceeds received from the sale of the plane. She explained that the proceeds were used to clear debts of their son, Jim Jr., with Great Southern National Bank and Jim Hankins Air Service. At the close of the plaintiff's case, all of the defendants moved for a directed verdict, which was eventually denied.

Defense expert, Billy H. Miller, admitted that the owner/operator of each aircraft must choose one of five possible inspection programs for the inspection of the airplane and that in the instant case, the defendants chose Option Number 4, which mandates that the owner/operator "follow a manufactured recommendation."

Michael Stephen Hankins, chief pilot of the King Air, testified that there was no question in his mind that Melton knew that the airplane was not overhauled at 3,500 hours. Michael explained that after he grounded the airplane, he recommended to Melton that he invest $30,000 in the hot section to make the King Air airworthy.

Testifying in his own behalf, James Hankins, the president and treasurer of Jim Hankins Air Service, admitted that he told Melton and Lebl that the King Air was a "good plane" and that he didn't expect any big ticket maintenance items in the near future. James Hankins explained that although he didn't say "I guarantee you," he was confident and "felt like there wouldn't be anything [to] come up in the near future, in a year or two or three." James Hankins explained that he also told

Melton and Lebl that the engines had 5,400 hours on them and that the manufacturer recommended 3,500 hours between overhauls. However, James Hankins testified that he did not know of the requirement that the engine could not fly over 3,500 hours and was surprised to learn that the repairs were going to be as expensive as they were.

James Hankins testified that, in a meeting after the airplane was grounded, he and Melton discussed the cost of repairing the airplane. During that meeting, Melton told Hankins "I thought I needed the airplane, but I don't." At that point, Hankins explained that he thought the "sensible thing to do – and I may have given the wrong advice – was not to fix it, sell it as is."

James Hankins also testified that neither he, Marian Hankins, nor Jim Hankins Air Service had ever owned the King Air. Hankins explained that in February of 1985, Jim Jr., bought the King Air for $125,000 from Dr. Guy Vice. Jim Jr., sold the King Air to Melton for $197,000 in July of 1985.[5] The proceeds from the sale of the aircraft were distributed as follows: $92,300 to Jim Hankins Air Service and $85,000 to Great Southern National Bank with Jim Jr., as the remitter. Hankins explained that the check made payable to Jim Hankins Air Service was to repay him for the money that he had paid in the purchase of the aircraft for Jim Jr.

---

[5] Mr. Hankins explained that Dr. Guy Vice owned the King Air from sometime in 1983 until February of 1985 when his son, Jim, Jr. bought it. Dr. Vice stored the King Air at the Hankins' facility.

On April 3, 1992, the case was submitted to the jury on fraud and alternative theories of warranty and implied warranty of merchantability. In an unanimous decision, the jury found in favor of the plaintiff, Melton, and against the defendants, James H. Hankins, Sr., Marian Hankins, and Jim Hankins Air Service, and awarded Melton damages in the amount of $75,000. The jury did not return a verdict against Jim Jr. The trial court entered its written order on May 5, 1992. After the trial court denied the defendants' post-trial motions, they filed this appeal.

II.

THE TRIAL COURT ERRED IN DENYING APPELLANTS' MOTION FOR A DIRECTED VERDICT OR JNOV AS THE EVIDENCE VIEWED IN THE LIGHT MOST FAVORABLE TO THE PLAINTIFF COULD NOT REASONABLY SUPPORT A FINDING OF FRAUD OR BREACH OF WARRANTIES. ALTERNATIVELY, THE JURY'S VERDICT WAS AGAINST THE OVERWHELMING WEIGHT OF THE EVIDENCE AND THE TRIAL COURT ABUSED ITS DISCRETION IN DENYING THE MOTION FOR A NEW TRIAL.

Hankins contends that based on the evidence presented in the instant case, a reasonable jury could not have found in Melton's favor on the fraud or warranty theories of recovery. Hankins, therefore, submits that the trial court erred in failing to grant a directed verdict or JNOV or, alternatively, a new trial since the verdict was against the overwhelming weight of the evidence.

A motion for a directed verdict or a JNOV "tests the legal sufficiency of the evidence supporting the verdict."

Goodwin v. Derryberry, 553 So. 2d 40, 42 (Miss. 1989) (quoting *Stubblefield v. Jesco*, 464 So. 2d 47, 54 (Miss. 1984)).

> It is a well-established rule that when a trial court, or the [Court of Appeals] in this case, considers such a motion, it must do so 'in the light most favorable to the party opposed to the motion.' The non-movant must also be given the benefit of all favorable inferences that may reasonably be drawn from the evidence. If the facts and inferences so considered point so overwhelmingly in favor of the defendant (movant) that reasonable men and women could not have arrived at a verdict for the plaintiff (non-movant), granting the motion is required. The burden on the movant in such cases is great, for if there is 'substantial' evidence opposed to the motion, which would allow reasonable and fair-minded men and women to reach differing conclusions, the motion must be denied.

Green Acres Farms, Inc. v. Brantley, 651 So. 2d 525, 528 (Miss. 1995) (citations omitted).

When addressing a motion for a new trial, "the trial judge should set aside a jury verdict when, in the exercise of his sound discretion, he is convinced that the verdict is contrary to the substantial weight of the evidence." *McKinzie v. Coon*, 656 So. 2d 134, 134 (Miss. 1995); *see also Harvey v. Wall*, 649 So. 2d 184, 186 (Miss. 1995).

The instant case was submitted to the jury on alternative theories of express and implied warranty and fraud. The jury returned a general verdict for the plaintiff. On appeal, Hankins advances arguments under each of the theories; however, because we find Hankins' statements

to the plaintiff to be affirmations of fact or promises, and a part of the "basis of the bargain," we will only address the express warranty theory.

An express warranty, which "may be verbal as well as written," *Fitzner Pontiac Buick-Cadillac, Inc. v. Smith*, 523 So. 2d 324, 325 (Miss. 1988), is controlled by section 75-2-313 of the Mississippi Code of 1972. Here, "we are concerned not so much with what the seller intended as with what he said." *Fitzner Pontiac Buick-Cadillac, Inc.*, 523 So. 2d at 325. "This includes what [Hankins] had said to [Melton] in the course of the negotiations." *Id.*

Mississippi law provides that "any affirmation of fact or promise made by the seller which relates to the goods and becomes part of the basis of the bargain creates an express warranty that the goods shall conform to the affirmation or promise." Miss. Code Ann. § 75-2-313 (1972). "An affirmation merely of the value of the goods or a statement purporting to be merely the seller's opinion or commendation of the goods does not create a warranty." *Id; Global Truck & Equip. Co. v. Palmer Mach. Workers*, 628 F. Supp. 641, 651 (N.D. Miss. 1989); *Fitzner Pontiac Buick-Cadillac, Inc.*, 523 So. 2d at 325.

In the instant case, Hankins admits that he told Melton and Lebl that the plane was "a good plane" and that the airplane would not need any major items of maintenance or repair in the near future. He explained that although he didn't say "I guarantee you," he was confident and "felt like there wouldn't be anything [to] come up in the near future, in a year or two or three." However, he contends that his statements were opinions on the value of the King Air and did not rise to the level

of an express warranty. Hankins argues that such statements are vague generalizations describing his opinion or expectations about the overall condition of the airplane, and lacked the specificity required to constitute an express warranty. Hankins, therefore, asks this Court to hold that given the ambiguous nature of the phrase "near future," his statements could not have been the "basis of the bargain" between Melton and the Hankins. We decline to so hold.

We agree with Melton that when reviewed in their entirety, the Hankins' statements went beyond simple commendations and puffing. Melton and Lebl were told that the airplane was a "good airplane" and that no major repairs were expected in the near future. They were led to believe that the engines had received scheduled maintenance and that no more than routine maintenance would be necessary in the near future. Such assurances and representations constitute express warranties. *See Limited Flying Club v. Wood*, 632 F.2d 51, 56 (8th Cir. 1980) (holding that an express warranty had been created when the defendant, seller of an airplane, showed the buyers the airplane's logbooks, which reflected repairs that had been performed on the airplane)).

We find that the trial court in the instant case acted properly in finding that "there was a jury question on the issue of whether there was a breach of express warranty" where "taking as true the testimony offered by the [buyer]." *Taylor v. Ward*, 393 So. 2d 1342, 1345 (Miss. 1981). "[I]n many sales of used or second hand vehicles, there may not be any express warranty, but in this case there was such evidence which should have been passed upon by the jury." *Id.* at 1346.

Upon examining the record, we are convinced that the evidence was legally sufficient to sustain the jury verdict and that the weight of the evidence supports the decision in favor of Melton. Accordingly, we find that the trial court did not abuse his discretion in denying the motion for a directed verdict, JNOV, or alternatively, a new trial.

III.

WHETHER FAULTY JURY INSTRUCTIONS RESULTED IN JURY CONFUSION AND WHETHER THE TRIAL JUDGE ABUSED HIS DISCRETION BY REFUSING TO GRANT APPELLANTS' MOTION FOR NEW TRIAL.

Hankins contends that Instruction P-3 is an incorrect statement of the law and was confusing to the jury. P-3, as presented to the jury, stated:

> If you find from a preponderance of evidence in this case that the defendants or any of them:
>
> A. Stated as a fact or promised to Mr. Frank Melton or anyone acting on his behalf that the airplane which is the subject of this lawsuit would not require any major items of maintenance or incur any major repair costs in the near future, or
>
> B. Described the airplane to Mr. Melton or anyone acting on his behalf as having no problems and assuring such person or persons that there would be no major or extraordinary maintenance expenses or stating that the engines have a lot of life left on them or otherwise assuring the plaintiff that

> the engines on the subject aircraft would present no major expense;
>
> Then any such statement constituted an express warranty as to the condition of the plane. If you further find that Frank Melton relied on such warranties, and that the airplane in fact was not in the warranted condition[,] [t]hen your verdict shall be for the plaintiff in an amount to be determined under other instructions pertaining to damages.

The record indicates that Hankins requested and was granted D-18 which clearly defined an express warranty. D-18 stated that:

> The Court instructs you that there was no written warranty provided by any seller to Frank Melton in relation to this airplane. The plaintiff's claim relates to oral guarantees or promises claimed to be made by the sellers.
>
> All comments and representations about the airplane do not create warranties. In order for something said by the seller to be an express warranty,
>
> 1. It must be either an affirmation of fact or promise;
> 2. It must relate to the airplane; and
> 3. It must become part of the basis of the bargain.

This Court does not review jury instructions in isolation; rather they are read as a whole to determine if they "announce the primary rules of law." *Bradford ex rel. Burton v. Barnett*, 615 So. 2d 580, 583 (Miss. 1993); *Strickland v. Rossini*, 589 So. 2d 1268, 1273 (Miss. 1991). Reversal

is in order on the basis of faulty jury instructions "where we find two or more instructions in hopeless and substantive conflict with each other." *Strickland*, 589 So. 2d at 1273. However, reversal is not proper "if other instructions clear up the confusing points." *Id.*

The jury instructions submitted in the instant case accurately reflected the rules of law applicable to a cause of action for breach of an express warranty. Because the jury was properly instructed, this Court finds that this assignment of error is without merit.

IV.

THE TRIAL COURT'S DENIAL OF APPELLANT'S MOTION TO DUPLICATE THE TRIAL TAPES FOR THE PURPOSE OF COMPARING THEM WITH THE OFFICIAL TRIAL TRANSCRIPT IS AN UNCONSTITUTIONAL DENIAL OF DUE PROCESS.

Hankins contends that the trial court erred when it refused to allow him to duplicate the trial tapes and that such refusal is an unconstitutional denial of due process. Hankins explains that upon discovering discrepancies in the record and at least one "obvious gap" in the official trial transcript at page 143, he moved the trial court to allow him to duplicate the trial tapes to compare them with the trial transcript.

The record indicates that after Hankins filed the "Statement of Errors in Trial Transcript" with the trial court, the court reporter reviewed the trial transcript and tapes and made the necessary changes. Upon reviewing page 143, we found that all this page reveals is a recess following the cross-examination of Melton, followed

immediately by his re-direct examination. Appellants have not suggested or demonstrated any errors or omissions which remain in the transcript, nor any damage done to their appeal as a result of any errors or omissions in the trial transcripts.

"The standard of review of a post-trial motion is abuse of discretion." *Johnson v. State*, 642 So. 2d 924, 928 (Miss. 1994); *Flowers v. State*, 601 So. 2d 828, 833 (Miss. 1992); *Robinson v. State*, 566 So. 2d 1240, 1242 (Miss. 1990). As such, Hankins was required to show an abuse of discretion, which he failed to prove. This assignment of error is without merit.

For the foregoing reasons, we affirm the judgment of the trial court.

THE JUDGMENT OF THE HINDS COUNTY CIRCUIT COURT IN FAVOR OF THE APPELLEE IS AFFIRMED. STATUTORY DAMAGES AND INTEREST ARE AWARDED. ALL COSTS ARE TAXED TO THE APPELLANTS.

FRAISER, C.J., BRIDGES AND THOMAS, P.JJ., BARBER, COLEMAN, DIAZ, MCMILLIN, AND SOUTHWICK, JJ., CONCUR.

PAYNE, J., DID NOT PARTICIPATE.

IN THE SUPREME COURT OF MISSISSIPPI

NO. 92-CA-0710

James A. Hankins, Sr., et al.,

Appellants

v.

Frank E. Melton

Appellee

ORDER

This matter came before this Court on the motion of the appellants to supplement the record. Miss.Sup.Ct.Rule 10(e) states in part as follows:

> (e) Correction or Modification of the Record. If any difference arises as to whether the record truly discloses what occurred in the trial court, the difference shall be submitted to and settled by that court and the record made to conform to the truth. . . . Any document submitted to this Court for inclusion in the record must be certified by the clerk of the trial court.

This Court finds that the motion of the appellants to supplement the record should be denied.

THEREFORE, IT IS ORDERED that the motion of the appellants to supplement the record be, and hereby is, denied.

SO ORDERED, this the 6th day of December, 1993.

/s/ James L. Roberts, Jr.
FOR THE COURT

Amendment XIV

. . . nor shall any State deprive any person of life, liberty, or property, without due process of law. . . .

Mississippi Constitution Art. 3

Section 24. All courts shall be open; and every person for an injury done him in his lands, goods, person, or reputation, shall have remedy by due course of law, and right and justice shall be administered without sale, denial, or delay.

Miss. Code Ann.

§ 11-51-3. Appeals to Supreme Court.

An appeal may be taken to the Supreme Court from any final judgment of a circuit or chancery court in a civil case, not being a judgment by default, . . .

§ 25-61-1. Short title.

This chapter shall be known and may be cited as the "Mississippi Public Records Act of 1983."

§ 25-61-3. Definitions.

The following words shall have the meanings ascribed herein unless the context clearly requires otherwise:

(a) "Public body" shall mean any department, bureau, division, council, commission, committee, subcommittee, board, agency and any other entity of the state or a political subdivision thereof, and municipal corporation and any other entity created by the Constitution or by law, executive order, ordinance or resolution. Within the meaning of this chapter, the term "entity" shall not be construed to include individuals employed by a public body or any appointed or elected public official.

(b) "Public records" shall mean all books, records, papers, accounts, letters, maps, photographs, films, cards, tapes, recordings or reproductions thereof, and any other documentary materials, regardless of physical form or characteristics, having been used, being in use or prepared, possessed or retained for use in the conduct, transaction or performance of any business, transaction, work, duty function of any public body, or required to be maintained by any public body.

§ 25-61-5. Public access to records; form and retention of denials.

(1) Except as otherwise provided by section 25-61-9 and 25-61-11, all public records are hereby declared to be public property, and any person shall have the right to inspect, copy or mechanically reproduce or obtain a reproduction of any public record of a public body in accordance with reasonable written procedures adopted by the public body concerning the cost, time, place and method of access, and public notice of the procedure shall be given by the public body, or, in the event that a public body has not adopted such written procedures, the right to inspect, copy or mechanically reproduce or obtain a reproduction of a public record of the public body shall be provided within one (1) working day after a written request for a public record is made. No public body shall adopt procedures which will authorize the public body to produce or deny production of a public record later than fourteen (14) working days from the date of request for the production of such record.

(2) Denial by a public body of a request for access to or copies of public records under this chapter shall be in writing and shall contain a statement of the specific reasons for the denial. Each public body shall maintain a file of all denials of requests for public records. Public bodies shall be required to preserve such denials on file for not less than three (3) years from the date such denials are made. This file shall be made available for inspection and/or copying during regular office hours to any person upon written request.

§ 25-61-9. Certain records furnished by third parties, protection; procedure; application of Trade Secrets Act.

(1) Records furnished to public bodies by third parties which contain trade secrets or confidential commercial or financial information shall not be subject to inspection, examination, copying or reproduction under this chapter until notice to said third parties has been given, but such records shall be released within a reasonable period of time unless the said third parties shall have obtained a court order protecting such records as confidential.

(2) If any public record which is held to be exempt from disclosure pursuant to this chapter contains material which is not exempt pursuant to this chapter, the public body shall separate the exempt material and make the nonexempt material available for examination and/or copying as provided for in this chapter.

(3) Trade secrets and confidential commercial and financial information of a proprietary nature developed by a college or university under contract with a firm, business, partnership, association, corporation, individual or other like entity shall not be subject to inspection, examination, copying or reproduction under this chapter.

(4) Misappropriation of a trade secret shall be governed by the provisions of the Mississippi Uniform Trade Secrets Act, Section 75-26-1 through 75-26-19.

(5) A waste minimization plan and any updates developed by generators and facility operators under the Mississippi Comprehensive Multimedia Waste Minimization Act of 1990 shall be retained at the facility and shall

not be subject to inspection, examination, copying or reproduction under this chapter.

§ 25-61-11. Records exempted or privileged by law.

The provisions of this chapter shall not be construed to conflict with, amend, repeal or supersede any constitutional or statutory law or decision of a court of this state or the United States which at the time of this chapter is effective or thereafter specifically declares a public record to be confidential or privileged, or provides that a public record shall be exempt from the provisions of this chapter.

IN THE SUPREME COURT OF THE STATE OF MISSISSIPPI

NO. 92-CA-0710

JAMES HANKINS, SR. ET AL

APPELLANTS

VS.

FRANK E. MELTON

APPELLEE

MOTION TO SUPPLEMENT RECORD

COMES NOW JAMES HANKINS, SR. et al, and move the Court to supplement the transcript on appeal as follows:

1. The record, when first presented to the appellants, contained numerous mistakes, a list of which was furnished to the trial court and court reporter. Some of the mistakes have been corrected, but numerous errors still exist.

2. The appellants further requested the trial Court to allow them to review the tapes of the trial appealed from but the trial Court denied the request.

3. The Appellants subsequently moved this Court to allow them to review the tapes of the trial, but this Court denied the request.

4. The Ex Parte Motion for Time to Correct Transcript, the Order granting the time but denying the request to furnish the tapes of the trial, and the Statement of Errors in Transcript Of Trial, all filed in the trial court, are not contained in the Clerk's Papers which are a part of the appellate record of this case. The appellants intend

to argue that the denial of the request to review the trial tapes by the trial court and this Court constitutes a denial of due process under the Mississippi and U.S. Constitutions, and that, consequently the three documents, attached hereto are necessary for this Court to consider this issue.

WHEREFORE, the appellants move this Court to supplement the record on appeal by inclusion of the three attached documents.

Respectfully Submitted,

JAMES HANKINS, SR. ET AL,
APPELLANTS

By: /s/ Thomas J. Lowe, Jr.
His Attorney

THOMAS J. LOWE, JR. MSB #1458
P.O. Box 2050
Jackson, MS 39225
Telephone: (601) 354-1027

CERTIFICATE

I, Thomas J. Lowe, Jr., certify that I have this day, January 13, 1994, mailed a copy of the foregoing Motion to the Hon. Joshua J. Weiner, P. O. Box 12023, Jackson, MS 39236-2023.

/s/ Thomas J. Lowe, Jr.
Thomas J. Lowe, Jr.

IN THE CIRCUIT COURT OF THE
FIRST JUDICIAL DISTRICT OF HINDS
COUNTY MISSISSIPPI

FRANK E. MELTON

PLAINTIFF

VS. CIVIL ACTION NO: 34,062

JAMES HANKINS, SR. ET AL

DEFENDANTS

EX PARTE MOTION FOR TIME TO
CORRECT TRANSCRIPT

(Filed March 25, 1993)

Come now the Defendants, by and through counsel, to stay the transmission of the transcript of the trial of this cause to the Supreme Court for the following reasons:

1. The Defendants have carefully read the transcript and have found numerous errors, some trivial, some material;

2. The Defendants will need to listen, if possible, to copies of the tapes of the trial to verify the accuracy.

Wherefore, the Defendants pray that this Court order the Clerk to stay the transmission of the record of this cause to the Supreme Court for a reasonable time in order for the Defendants to review the tapes of the trial with the transcript;

The Defendants further pray that the Court order the Court Reporter to make available the tapes of the trial of

this Cause or true copies thereof to the Defendants for the above-stated purposes.

Respectfully Submitted,

JAMES HANKINS, SR. ET AL,
DEFENDANTS

By: /s/ Thomas J. Lowe, Jr.
Their Attorney

THOMAS J. LOWE, JR. MSB #1458
P.O. Box 2050
Jackson, MS 39225
Telephone: (601) 355-2900

IN THE CIRCUIT COURT OF THE
FIRST JUDICIAL DISTRICT OF HINDS
COUNTY MISSISSIPPI

FRANK E. MELTON

PLAINTIFF

VS. CIVIL ACTION NO: 34,062

JAMES HANKINS, SR. ET AL

DEFENDANTS

STATEMENT OF ERRORS IN TRANSCRIPT OF TRIAL

(Filed May 3, 1993)

Come the Defendants and state that they believe that the following errors exist in the current transcript of the trial and request the Court to amend the transcript or, if necessary, to allow the parties or their counsel to listen to the tapes of the trial in order to correct the transcript.

ERRORS

---

006 Melton

P. 040	Line 19	Taxi tank?
P. 040	Line 21-27	Don't remember this being said.
P. 040	Line 23-25	What was the arrangement made to have your pilot tip in?
P. 045	Line 19	Michael Hankins, Sr.?
P. 049	Line 11	Michael Hankins, Jr.?
P. 060	Line 11-12	inserted? It was done on a bid basis.
P. 067	Line 24-25	her whole charter.
P. 068	Line 8	did Jeff Hankins, Sr.

P. 069 Melton Cross

P. 073	Line 9	Mike Hankins, Jr.,?
P. 077	Line 20	cash or crash or?
P. 078	Line 4-9	Doesn't make sense. Something is not written correctly.
P. 090	Line 12-13	Confusing (2) different values.
P. 090	Line 6-7	this says 240? With high hours.
P. 106	Line 20	240?
P. 106	Line 26	knew?
P. 108	Line 7	by.
P. 122	Line 18	Title or purchase.
P. 124	Line 6	113?
P. 129	Line 25-29	Don't recall this
P. 130	Line 1-10	Don't recall this and it seems strange at this point of questioning.
P. 136	Line 26-28	Don't recall anything said about bid.
P. 137	Line 3	(63)?
P. 141	Line 4	Patient.
P. 141	Line 29	(don't remember it this way)
P. 143	Line 13-14	missing something. – Buffy Beach never finished (Recess) What happened precisely? Re-Direct examination by Holland? (Something is missing?)
P. 143	Line 21	Something is missing
P. 150	Line 17	Jim Hankins Sr.

P. 151	Line 2	Bids on the plane, don't remember this.
P. 152	Line 9	Hankins Aviation.
P. 152	Line 8	(Hankin Aviator, Inc.). Need exhibit – April 39, 1985, 12:00 noon.

P. 153 Dewayne Lebl Testimony

P. 160	Line 12	Told couldn't use as air taxi. Told cost $120,000.00 to overhaul engine. Incoherent.
P. 160	Line 22-23	mechanism – doesn't make sense
P. 160	Line 7-19	Don't remember it this way.
P. 161	Line 28	told recommend 3,500 between overhauls.
P. 161	Line 6-26	incoherent – not right, sounds crazy, may be written wrongly.
P. 161	Line 6-26	incoherent.
P. 162	Line 1-5	confusing
P. 162	Line 1-5	tied in together 12,000 hours in Canada only; confusing.
P. 162	Line 2-29	confused.
P. 162	Line 14-15	Not how I remembered.
P. 163	Line 1-29	confused. Line 5 Dewayne said rental income not lease.
P. 164	Line 12-13	plane would not cash flow – contradiction, confusing.
P. 164	Line 12	confusing.
P. 169	Line 13-15	company (WLBT) rented not leased.

P. 170	Line 6	Confusing.
P. 172	Line 6	Don't remember this.
P. 177	Line 8-9	To translate – note B in this loan or $177,000.00 came from Trustmark?
P. 177	Line 1	incoherent. Jury about of any money. Line 8-9 Trustmark???
P. 178	Line 23-27	Plane would not break even – needed rental not lease income.
P. 185	Line 4	Before oil crunch-don't remember.
P. 185	Line 4-5	"would say the biggest item definitely would" – sentence confusing.
P. 185	Line 4-5	Confusing.
P. 186	Line 12-28	Near future, not 3 to 5 years.

P. 187 Tolbert testimony errors, need tape.

P. 188	Line 13	incoherent.
P. 188	Line 22	"we are now for 11 years". Confusing.
P. 189	Line 17-29	Question: where did you write no big
P. 192	Line 10	I was like. – incoherent.
P. 192	Line 11	Cursory inspection.
P. 192	Line 23	Cursory of aircraft?
P. 192	Line 4	cursory? incoherent.
P. 193	Line 11	Rates?
P. 193	Line 3	FAA maintenance rates? Incoherent Line 11 rates? Incoherent.

P. 197	Line 11	We're? Only 1 person talking.
P. 198	Line 18	"for the" confusing.
P. 198	Line 18-19	incoherent.
P. 201	Line 14	"We"? Who? Only one person suppose to be talking in the first person or was he with someone or did he see another person?
P. 201	Line 27-29	Air carrier pilot – certificate RCI A-41 Hotel? Confusing.
P. 202	Line 4-6	incoherent.
P. 203	Line 4-10	Doesn't make sense.
P. 205	Line 21	overhauling – (inspecting)

P. 218 Watson's Testimony

P. 223	Line 20	Bratton (not right).
P. 225	Line 5	Relates to Maintenance?
P. 240	Line 14-19	Refer to Page 223, Line 25-29 same.
P. 243	Lines 7	With the sale of the aircraft.
P. 246	Line 3	"as August" – confusing.
P. 247	line 13	Corporate Mill.
P. 247	Line 17	day before? Incoherent.
P. 251	Line 24	"for" – confusing.
		NOTE: Some of Tolbert's and Watson's testimony is missing – Sunscreen was mentioned and is not in either testimony.
P. 258	Line 13	Not Louise – Marion Lou Hankins

P. 268	Line 6-8	Not in complete form – need tape.
P. 269	Line 8	need tape, not like it was said in court.
P. 269	Line 13	something is missing.
P. 274	Line 8	not like it was said.
P. 278	Line 15-29	Confusing – Don't think it was said this way.
P. 279	Line 1-5	Not right.
P. 279	Line 21-25	Confusing. Also line 1-5.
P. 279	Line 3	(you) referring to Jim Hankins Sr.? (Confusing.)
P. 284	Line 2-5	Don't remember it this way.
P. 284	Line 2-5	Don't remember saying this.
P. 289	Line 2	Don't remember it this way.
P. 297	Line 13	Corporate Mill.
P. 299	Line 8	incoherent

P. 299 Missing Statements And Inserted Material:

Holland Watson – Sunscreen was omitted from transcript it was mentioned at the trial.

Melton – Put up for bids – note: never heard bids mentioned at trial

Jim Hankins – One or two or three years – never heard this at trial.

P. 308 Billy Miller's Testimony

P. 309	Line 29	Something missing.
P. 310	Line 19-20	Incoherent (something missing.)
P. 310	Line 1	Something missing.
P. 312	Line 20-21	something missing.
P. 312	Line 27-29	something missing.
P. 312	Line 7	"Recently."
P. 315	Line 18-20	Something is missing.
P. 317	Line 15	incoherent.
P. 318	Line 10	Confusing
P. 318	Line 11	"here" – (I think "there")
P. 320	Line 6	"191".
P. 321	Line 16	Not coherent. – "this one was built for 91"
P. 321	Line 26	"including compliance with part 39".
P. 322	Line 13	Whether it's 35,45, or what not, not coherent.
P. 323	Line 12	"as" – what do they mean?
P. 323	Line 26	Part 31?
P. 324	Line 13	Unclear as to date. – Same reference March 21, 1985.
P. 324	Line 4	Date, March 21, 1984?
P. 326	Line 8	One of the *airplanes*. Confusing
P. 327	Line 3	5,222.40 (Time on engine in 5/11/84.)

P. 334 Michael Hankins Testimony:

P. 335	Line 29	Incoherent, wrong.
P. 336	Line 2-7	Check tape.
P. 336	Line 16	Incoherent, "I sold it." (Should be "soloed")
P. 337	Line 11	Don't remember it this way.
P. 338	Line 27-29	Don't remember it this way – referring to JHN.
P. 344	Line 5	wrong date.
P. 347	Line 17	had some 5,544 (did it fly backward?) Wrong numbers.
P. 347	Line 8	had some 5,444 m. on it.

P. 350 Jim Hankins Testimony

P. 355	Line 18-19	Not said like this (something missing)
P. 360	Line 16-17	"in a year or two or three" – Don't think Jim Hankins said this only said in the near future.
P. 361	Line 6-7	confusing.
P. 363	Line 12	never said this

Respectfully Submitted,

JAMES HANKINS, SR. ET AL,
DEFENDANTS

By: /s/ Thomas J. Lowe, Jr.
His Attorney

THOMAS J. LOWE, JR. MSB #1458
P.O. Box 2050
Jackson, MS 39225
Telephone: (601) 355-2900

CERTIFICATE

I, Thomas J. Lowe, Jr., hereby certify that I have this date, May 3, 1993, served by U.S. Postage, first class, the foregoing Statement of Errors on the following persons at these addresses:

Ms. Sarah Sims, Court Reporter
P.O. Box 327
Jackson, MS 39205

Hon. Joshua J. Weiner
P.O. Box 12023
Jackson, MS 39236-2023

/s/ Thomas J. Lowe, Jr.
Thomas J. Lowe, Jr.

IN THE CIRCUIT COURT OF THE
FIRST JUDICIAL DISTRICT OF HINDS
COUNTY MISSISSIPPI

FRANK E. MELTON

PLAINTIFF

VS. CIVIL ACTION NO: 34,062

JAMES HANKINS, SR. ET AL

DEFENDANTS

ORDER

The *Ex Parte* Motions for Time to Correct Transcript filed by the Defendants is sustained as to the stay of the transmission of the record on appeal to the Mississippi Supreme Court and denied at this time as to the request for the defendants to review the court reporter's tapes of the trial or copies thereof.

The defendants will submit to the Court no later than April 30, 1993, a list of specific discrepancies or inaccuracies in the transcript and serve a copy of same upon opposing counsel.

Ordered This 13th day of April, 1993.

/s/ Robert Lewis Gibbs
Circuit Judge

Drafted by:

THOMAS J. LOWE, JR. MSB #1458
P.O. Box 2050
Jackson, MS 39225
Telephone: (601) 355-2900

Attorney for Defendants

---

(2)

Supreme Court, U.S.
FILED
MAY 15 1996
CLERK

NO. 95 - 11688

In the

SUPREME COURT OF THE UNITED STATES

October Term, 1995

JAMES HANKINS, SR., MARIAN HANKINS, AND
JIM HANKINS AIR SERVICE, INC.

Petitioners

vs.

FRANK E. MELTON

Respondent

On Petition for Writ of Certiorari
to the Mississippi Court of Appeals

BRIEF IN OPPOSITION

Joshua J. Wiener, MSB #7185
P.O. Box 55728
1438 North State Street
Jackson, MS 39296-5728

tel: (601) 353-1444
fax: (601) 353-2444

Counsel of record for Respondent

10 pp

QUESTION PRESENTED

Whether the decisions of the trial court, Mississippi Court of Appeals, and Mississippi Supreme Court, denying Petitioners' request to correct the record on appeal pursuant to Mississippi Rule of Appellate Procedure 10, deprived Petitioner of rights guaranteed under the Fourteenth Amendment of the United States Constitution.

TABLE OF CONTENTS

QUESTIONS PRESENTED I
TABLE OF CONTENTS ii
TABLE OF AUTHORITIES iii
REASONS FOR DENYING THE WRIT 1
CONCLUSION 4

TABLE OF AUTHORITIES

PAGE

CASES:

Boddie v. Connecticut, 401 U.S. 371 (1971) 1

OTHER:

Mississippi Rules of Appellate Procedure 10 . . . . . 1 - 3

REASONS FOR DENYING THE WRIT

This Petition does not meet any of the criteria set forth in United States Supreme Court Rule 10. There is no important question of federal law to be settled by this Court. The challenged decisions below do not conflict with any decision of a state court of last resort, or with a decision of a United States Court of Appeals or this Court. There is no compelling reason for the Court to grant this Petition.

Petitioners' Motions to correct the trial transcript were governed below by Mississippi Rule of Appellate Procedure 10(e), which is virtually identical to its federal counterpart. At best, Petitioners are dissatisfied with the manner in which the Mississippi Supreme Court and Court of Appeals applied Rule 10 to their Motions. Rule 10 of this Court expressly states, however, that "a petition for writ of certiorari is rarely granted when the asserted error consists of erroneous factual findings or the misapplication of a properly stated rule of law."

Petitioners attempt to construct a constitutional issue by arguing that the denial of their Motions to supplement the appellate record deprived them of the right of "access to the courts," which is protected under the Fourteenth Amendment's guaranty of due process. Surely, the constitutional right of access to the courts cannot be invoked merely because a party loses a procedural Motion during the course of civil litigation. Rather, the right of access to the courts requires scrutiny of judicial procedures or mechanisms such as filing fees, or a prisoner's lack of access to a law library, which deny a party a "meaningful opportunity to be heard." E.g. Boddie v. Connecticut, 401 U.S. 371 (1971).

Petitioners have had access to every available court, and meaningful opportunities to be heard on the merits of this case at every level: a jury trial, on post-judgment Motion before the trial court, on appeal to the Mississippi Court of Appeals, on

Petition for Rehearing to the Court of Appeals, and on Petition for Writ of Certiorari to the Mississippi Supreme Court. The integrity of the Mississippi appellate courts' decisions on the merits certainly depended on the preparation in the first place of an accurate trial transcript. But each of the courts below also gave Petitioners a meaningful opportunity to be heard regarding their assertions that the trial transcript contained inaccuracies.

Petitioners filed an "Ex Parte Motion for Time to Correct Transcript" in the trial court. The trial court permitted Petitioners to submit a statement of alleged errors in the trial transcript. After Petitioners filed their statement of alleged errors, the Court Reporter reviewed the transcript, and made all proper corrections.

After their appeal was docketed with the Mississippi Supreme Court, Petitioners filed a Motion to Supplement the record pursuant to Rule 10(e) challenging the accuracy of the trial transcript, and asking the Supreme Court to order the Court Reporter to make her tape recording of the trial available for their personal verification. Subsequently, the Mississippi Supreme Court Clerk received a letter from the Reporter (see Appendix) stating that the remaining "corrections" to the transcript requested by Petitioners would represent a substantive change in the testimony actually presented at trial, rather than a correction of the transcript. The Supreme Court denied Petitioners' Motion.

In their subsequent Brief on appeal, Petitioners again argued the inaccuracy of the transcript, and asserted a denial of their right to due process. The Mississippi Court of Appeals, to which the case was referred for decision by the Mississippi Supreme Court, made a finding of fact based on its own review of the transcript that Petitioners' assignment of error regarding the transcript was ill founded.

Notwithstanding the fact that Petitioners had several

meaningful opportunities to be heard regarding the alleged inaccuracies of the transcript, Petitioners argue that their right to Fourteenth Amendment due process was violated by the Mississippi Supreme Court's refusal to order the Court Reporter to make her tape recording of the trial available for Petitioners' review. Such a procedure is neither required nor authorized by Rule 10 of the Mississippi or Federal Rules of Appellate Procedure. The constitutionality and fairness of those rules is unquestioned.

Under the Rules, the official record of live trial testimony is a written transcript prepared and certified by a qualified, disinterested Court Reporter, who may utilize shorthand, and/or various recording devices such as stenographic machines, tape recorders, and computer disks as tools in the preparation of the written transcript. Were this Court to decide that parties to a civil lawsuit may demand an opportunity to personally review a court reporter's notes, tapes, or computer media, lest their Fourteenth Amendment rights be infringed, would be an obvious invitation for chaos. Mississippi and Federal Rules of Appellate Procedure 10 would become a ready source of costly satellite litigation over the accuracy of the transcript, which would undermine the integrity and finality of the civil litigation process.[1]

---

[1] Whether the courts below should have ordered the Reporter to make her tapes available pursuant to the Mississippi Constitution and/or the Mississippi Public Records Act was not properly preserved below, and in any event is purely an issue of Mississippi, not federal law. Similarly, Respondents will not respond to Petitioners' arguments concerning the merits of this case, which involved implied warranties of merchantability under Mississippi's Uniform Commercial Code in the context of the sale of an airplane. This too is purely a matter of Mississippi law.

CONCLUSION

This case was decided adversely to Petitioners based on an accurate, carefully critiqued trial transcript. Petitioners' access to the courts and rights to due process have not been infringed. Respondent asks this Court to deny the Petition for Writ of Certiorari.

Respectfully submitted,

JOSHUA J. WIENER, MSB # 7185
P.O. Box 55728
1438 North State Street
Jackson, MS 39296-5728
tel: (601) 353-1444
fax: (601) 353-2444

Counsel of record for Respondent
Frank E. Melton

Brief in Opposition
Appendix A

October 26, 1993

Ms. Linda Stone
Mississippi Supreme Court Clerk
P.O. Box 249
Jackson, MS 39205-0249

Re: Hankins et al. v. Frank E. Melton
No. 92-CA-0710

Dear Ms. Stone:

As the record reflects, I reported the trial of this matter and filed the transcript with the trial court. Appellee's counsel has provided me with a copy of Appellant's Motion to Supplement Record Insofar as the Motion alleges that the transcript still contains numerous mistakes, counsel has requested that I respond directly to the Court as to whether or not I stand by the transcript now on file with the Supreme Court.

After the transcript was filed in the trial court, Appellants filed a "Statement of Errors in Transcript of Trial." The "Statement" sets forth numerous alleged errors in the transcript. Upon receipt of that filing I reviewed the trial transcript at every place cited in Appellants' "Statement." I did make a few corrections, all of which were minor in nature. I found Appellants' remaining requested changes unwarranted, and so notified the trial court.

Appellants claim that witnesses said things other than that which they in fact said on the witness stand and which I duly

Appendix A

reported. They suggest that corrections be made because they "did not remember the testimony being given as reported. In other instances they seek to supplement, clarify or change the testimony that was actually given, indicating that the reported testimony was "confusing," "contradictory," or "didn't make sense."

The changes requested by Appellants represent substantive changes in the record presented at trial, In my experience, this is unprecedented.

Having reviewed the transcript after Appellants' filing in the trial court, I am satisfied that it is a complete and accurate transcript of the trial proceedings.

Thank you.

Sincerely,

s/ Sara Sims

Ms. Sara Sims

(currently on maternity leave)
1139 Greenbriar Street
Jackson, MS 39211

cc: Hon. Thomas J. Lowe, Jr.
Hon. Joshua J. Wiener

Exhibit "B"